Yale Human Rights and Development Law Journal

Volume 12
Issue 1 *Yale Human Rights and Development Journal*

Article 7

2009

The Politics of Constructing the International Criminal Court, by Michael J. Struett

Yuan Ji

Book Review

The Politics of Constructing the International Criminal Court, *by* Michael J. Struett

Publisher: Palgrave Macmillan
Price: $79.95
Reviewed by: Yuan Ji

On January 26, 2009, the International Criminal Court (ICC) commenced the trial of Thomas Lubanga, a Congolese militia leader whose followers have been accused of gross human rights violations including rape, ethnic massacre, torture, and conscription of child soldiers. This was a noteworthy day in the history of international criminal justice, as the Lubanga trial was the first trial held at the ICC since the Court came into existence almost seven years ago. This year is also significant because the Rome Statute grants the ICC jurisdiction over aggression, a term to be defined no earlier than seven years after the Statute goes into effect, and July 2009 will mark the Statute's seven-year anniversary. In this context, the recent publication of Michael Struett's *The Politics of Constructing the International Criminal Court* comes as a timely analysis of and tribute to the Rome Statute, whose ratification on July 1, 2002 activated the ICC's existence in international law and global governance.

The most interesting question that the book seeks to answer is this: why were so many nation-states willing to reduce their own sovereignties by granting significant authority to a strong, independent international tribunal? In answering this question, Struett places unique emphasis on the discourse by various non-governmental organization (NGO) advocates during the ratification process. Struett makes a valuable contribution to existing scholarship in the field[1] by explaining the discursive role that

1. Although previous scholars have not shared Struett's focus on the NGOs' role during the Rome negotiations, existing scholarship discusses various nation-states' concerns about potential compromises of their own sovereignties and the crucial role that the ICC's complementary jurisdiction plays in their willingness to ratify the Rome Statute. *See, e.g.*, COMPLEMENTARY VIEWS ON COMPLEMENTARITY : PROCEEDINGS OF THE INTERNATIONAL ROUNDTABLE ON THE COMPLEMENTARY NATURE OF THE INTERNATIONAL CRIMINAL COURT,

Yale Human Rights and Development Law Journal, Vol. 12 [2009], Iss. 1, Art. 7

NGOs can play in forming international policy consensus between sovereign nations, and by highlighting the results of the NGOs' dialogue. While this focus on NGOs is a unique contribution to existing analyses of the ICC, the broad membership of the NGO community makes it difficult to account in detail the motives, roles, and actions of specific non-governmental entities that were involved in the ICC negotiations. Understanding the reasons behind individual NGOs' involvements at different phases of the ICC construction is important and informative, since there can be significant disparities in their interests and sources of financial support. Even though Struett may not wish to focus on these reasons, their absence is a potential weakness of Struett's work. Additionally, Struett's narrative pays particular attention to the United States' involvement throughout the negotiation process which, as this review will discuss later, is not an entirely unjustified bias.

The ICC is the first international tribunal vested with permanent authority to try criminal cases against individual perpetrators of genocide, war crimes, and crimes against humanity. In that context, the formation of the ICC may mark the end of a history in which individuals responsible for the most heinous crimes of mass violence could act with impunity and without fear of legal consequences. Struett's book offers an insightful analysis of the key features of the ICC, the events leading up to its ratification, and the strategies of pro-ICC organizations that proved effective during negotiations. Struett's central claim is that NGOs played a crucial role in developing the Rome Statute and in securing enough signatures to effect its ratification less than four years after the Statute first opened for signatures. His account outlines how NGOs used rational arguments and common-ground norms effectively to persuade an international audience.

Struett acknowledges the notion of state sovereignty as the key reason why earlier discussions of establishing an international criminal tribunal failed to lead to a permanent court like the ICC. In the late 1940s and early 1950s, NGOs presented arguments advocating the establishment of an international criminal court; although these arguments were considered by the United Nations General Assembly's Sixth Committee in the late 1950s, at the time they were not fruitful. This raises a possible critique of Struett's central thesis: if NGOs did play a pivotal role in the establishment of the ICC in the 1990s, why were they not able to accomplish the same goal four decades earlier? Struett anticipates this question and responds by pointing to the polarized political atmosphere during the Cold War era. As the two ideological camps developed and diverged during this period, the notion of a neutral tribunal adjudicating in complete freedom from the influence

AMSTERDAM 25/26 JUNE 2004 (Jann K. Kleffner & Gerben Kor eds., 2006); STATES' RESPONSES TO ISSUES ARISING FROM THE ICC STATUTE: CONSTITUTIONAL, SOVEREIGNTY, JUDICIAL COOPERATION AND CRIMINAL LAW (Roy S. Lee, ed., 2005).

of either superpower became less credible.[2] Furthermore, Struett suggests that the prevailing understanding during the 1950s of the mutually exclusive sovereignties of states was incompatible with the intrusion of an independent institution's enforcement of international criminal law. Of course, later efforts to create an international criminal tribunal in the 1990s faced this same problem, but Struett posits that it was much more difficult to make a normative argument favoring a neutral third-party body of adjudication in a world divided into two ideological camps, each of which viewed the other as a constant source of threat and distrust. Although the United States and the Soviet Union cooperated to establish tribunals during the post-World War II period and could have cooperated to establish a permanent court,[3] Struett observes that the two countries limited their cooperation to examining the Axis powers' culpability instead of their own.[4] Because most participants in the dialogue in the 1950s concerning the establishment of an ICC were state representatives or state-appointed members of the International Law Commission,[5] the dialogue was also limited to formal authority figures who did not necessarily have decision-making powers within their respective countries. Vulnerable populations who would later become victims of war crimes, genocides, and crimes against humanity did not have "sufficient voice within civil society to bring their views to bear on the decision-makers in national government."[6] All of these factors contributed to the failure among states to establish an international criminal tribunal in the 1950s.

The post-Cold War years presented the NGO community with an opportunity to garner support for an international tribunal. Pro-ICC NGOs successfully formed a coalition and expanded membership through outreach to other NGOs. As an illustration of the coalition's success, about 1,500 NGOs were present at the 1993 World Conference on Human Rights in Vienna, which provided a forum for networking among NGOs committed to the promotion of an ICC. A year later, these NGOs participated in a conference call and established the Coalition for an International Criminal Court.[7] They agreed to coordinate efforts during

2. MICHAEL J. STRUETT, THE POLITICS OF CONSTRUCTING THE INTERNATIONAL CRIMINAL COURT: NGOS, DISCOURSE, AND AGENCY 55 (2008).

3. The United States and the Soviet Union agreed on a charter for the Nuremberg court on August 8, 1945, and later cooperated to operate the International Military Tribunal for the Far East in 1946.

4. STRUETT, *supra* note 2, at 53.

5. The International Law Commission was established by the United Nations General Assembly in 1948 to promote the development and codification of international law. Instead of serving as representatives with decision-making powers within their respective states, "[t]he members of the ILC are elected in their individual capacities to provide their own unique expert judgments on the evolution of international law. However, they are nominated by governments, and their own views on international law historically have reflected the views of their government." STRUETT, *supra* note 2, at 56-57.

6. *Id.* at 65.

7. The use of conference call technology is important, since Struett identifies technical complexity as another obstacle to coordinating dissenting voices and to reaching compromises

Yale Human Rights and Development Law Journal, Vol. 12 [2009], Iss. 1, Art. 7

the upcoming consideration of a draft ICC statute by the United Nations General Assembly's Sixth Committee. The NGO coalition effectively increased its claim to legitimacy by publishing objective opinions detailing reasons to advocate both for and against the formation of an ICC.[8] Additionally, the coalition of NGOs was also willing to consider different blueprints for the court's design. Struett makes the revealing observation that unlike state representatives, whose legitimacy lies in their selection by their respective states, NGOs can only maintain their legitimacy by making arguments that appeal to reason rather than to power. The net result was that instead of allowing representatives from a few states to focus only on elements of the Rome Statute that were of interest to them, the NGOs shaped the discussion into one involving state and non-state representatives interested in a variety of issues.

In Struett's terminology, the NGOs' persuasive legitimacy was just as influential as the states' representational legitimacy, and the negotiations became communicative and rational rather than strategic as a result. Struett illustrates the difference between communicative and strategic arguments during the Rome negotiations by examining the dialogue generated by the United States' contention that the ICC should not exercise jurisdiction over states without their consent.[9] Stating the accepted principle of international treaty law that treaties cannot create new obligations for non-participating parties is an example of a communicatively rational argument. A strategic argument, on the other hand, might reason that U.S. citizens should be exempt from unwanted ICC jurisdiction since the United States plays a unique role in maintaining international peace and security. According to Struett, the United States made both kinds of arguments during the ICC debate. The communicatively rational argument was widely accepted by participants in the debate, but the strategic one was not.

Struett convincingly argues that the foundation of the NGOs' persuasive legitimacy lies in their discursive practice of establishing topoi, or common premises shared by nation-states, and that making arguments based on these mutual standards was instrumental in the early stages of ICC negotiations. The four topoi that emerged from the ICC debate are encapsulated by Struett as follows:

1. The need to end a history of immunity for individual leaders who commit crimes in the name of their states,

2. The importance of providing equal justice for individuals who have committed similar criminal violations of international law,

---

during the 1950s discussions of forming a permanent international tribunal.

8. MICHAEL J. STRUETT, THE POLITICS OF CONSTRUCTING THE INTERNATIONAL CRIMINAL COURT: NGOS, DISCOURSE, AND AGENCY 79 (2008).

9. *Id.* at 125.

regardless of the time and place of perpetration,

3. The grounding of the ICC in existing international statutes so that it does not create new international law but can claim jurisdiction over the most odious crimes already recognized by existing law, and

4. The existence of procedures that protect the rights of the accused with a presumption of innocence.

With a focus on the first two in particular, Struett analyzes and provides specific examples of NGOs' efforts in establishing these four common premises. Once the topoi gained mainstream acceptance in the international community, they created a common starting point in the dialogue among nation-states so that arguments based on these topoi were given greater consideration in the negotiation process. An illustration of NGOs' efforts to establish topoi can be found in a 1996 Human Rights Watch paper[10] that emphasized the urgent need to end impunity for the most egregious human rights crimes such as genocide, war crimes, and crimes against humanity. Struett claims that the NGO strategy in this paper was to create a sense of urgency by reminding state delegates that contrary to the first topos in the outline above, the "atrocious crimes under consideration were recurring problems in the contemporary world." As this invocation of urgency gained wider acceptance through later negotiations, the need to end impunity for the crimes listed above eventually became the foundation for subsequent negotiations among nation-states.[11] As evidence for this acceptance, Struett observes that policy recommendations made by the 1996 Human Rights Watch paper regarding subject matter jurisdiction, the complementarity regime, and the mechanisms for the ICC to exercise jurisdiction were all incorporated into the final policy choices made in the Rome Statute.

As negotiations progressed, NGOs' continued appeal to topoi played a crucial role in four important issues that Struett thoughtfully explicates in his book: the list and definition of crimes to be included in the ICC's jurisdiction, the complementary structure of jurisdiction between ICC and domestic tribunals within individual nation-states, the trigger mechanism for activating ICC jurisdiction, and the pace of progress in the negotiations. At the Rome Conference, from which the Rome Statute was to emerge, NGOs demonstrated remarkable dexterity in modifying their positions in response to new issues that emerged in the course of discussion and offering counterproposals after quick analyses of the new issues. One of their initiatives sought to identify students and faculty from law schools in

10. HUMAN RIGHTS WATCH, COMMENTARY FOR THE PREPARATORY COMMITTEE ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT (1996).

11. STRUETT, *supra* note 7, at 89.

Yale Human Rights and Development Law Journal, Vol. 12 [2009], Iss. 1, Art. 7

the United States and Western Europe who would be willing to serve as legal counsel for less developed nations[12] in order to ensure that their voices would be heard in the ICC negotiations. NGOs took assertive but persuasive stances on the definition of key terms such as "genocide" and, at the same time, kept in mind the compromises necessary to ensure the passage of the Statute. As a result, consensus began to form that the ICC should be granted inherent jurisdiction over three categories of crimes: genocide, war crimes, and crimes against humanity. In this way, NGOs' efforts had a direct impact on the final wording of the Rome Statute and consequently, on the scope of the ICC's jurisdiction.

In the ratification process of the Rome Statute, the NGOs acted strategically by focusing on getting signatures rather than ratifications from the nation-states.[13] A state's signature, although not binding, expresses its intent to ratify later and to not act contrary to the terms of the treaty in the interim. Because ratifications from 60 states were required to enact the ICC, the NGOs focused on obtaining signatures first, which were much easier to grant within the political structures of individual nation-states. As more signatures were collected, the general pattern established was then used to convince nation-states that the ICC was likely to be ratified and that its jurisdiction would not be geographically limited to the few states that chose to ratify early on in the process.[14]

Struett also proposes that by actively advocating complementary jurisdiction as a mechanism to curtail the Court's power, the NGO community played a crucial role in persuading states to agree to constraints upon their sovereignty in support of an international court such as the ICC. The Rome Statute provides that any case already subject to a genuine investigation and prosecution in a national court cannot be heard by the ICC, with the caveat that ICC can make the final determination of the prosecution's genuineness. States' willingness to reduce their own sovereignty in deference to the ICC is not only grounded in the complementary nature of its jurisdiction but also in its permanence. Because ad hoc tribunals relied on external military backing to control regions crucial to gathering witness testimony and evidentiary documentation, they had to be established quickly before political support for providing the necessary troops waned.[15] Local cooperation was often unavailable or half-hearted, especially if the accused still enjoyed political or military power in the country. Struett suggests that as a permanent court with wide support from the global community and therefore less need for support from particular power(s), the ICC effectively avoids

12. These countries included Sierra Leone and Bosnia, which had recently witnessed crimes covered under the ICC's jurisdiction.

13. STRUETT, *supra* note 7, at 134-35.

14. Under the terms of the Rome Statute, such geographical limitations no longer apply once the Statute is activated by reaching a minimum of 60 state ratifications. After activation, the Statute extends jurisdiction to all states that have signed onto the treaty.

15. STRUETT, *supra* note 7, at 161.

problems that ad hoc war crime tribunals had encountered in the past and therefore is more persuasive in soliciting nation-states' willingness to reduce their own sovereignties to a legitimate international court.

One bias in Struett's perspective is his particular emphasis on the United States' attitudes and incentives throughout the negotiation and ratification process of the ICC. In the early 1990s, for example, Struett suggests that because the U.S. government was involved in military conflicts with states when it would have likely preferred to prosecute individual leaders,[16] the idea of a permanent international criminal tribunal was an appealing one. However, Struett offers justification for his focus on the United States' political atmosphere by explaining that if the U.S. had shown outright opposition in the beginning stages of the negotiations, the other states would have been much less inclined to pursue the establishment of an international criminal court. In addition, Struett observes that the United States had historically been an advocate of the rule of law in the international community. Its concern that its sovereignty might be compromised was shared by other states, and any hesitation that the United States had shown in endorsing the ICC probably would have been a fair barometer of the general sentiments shared by other states involved in the negotiations. In this sense, Struett's emphasis on the United States is justified and gives a pre-ICC context to the Bush administration's withdrawal of the United States' signature in May 2002. This decision not only runs counter to the United States' tradition of leadership in international justice but, more alarmingly, undermines the ICC's efficacy in providing equal justice by decreasing the tribunal's legitimacy in the eyes of the other countries in the world.

By presenting the motives and arguments advanced by the U.S. and other major state players throughout the negotiations, and by examining NGOs' discursive interactions with them in the process, *The Politics of Constructing the International Criminal Court* offers an insightful analysis of the process of compromise leading up to the birth of the ICC and NGOs' persuasive role in this process. The success of these NGOs is especially impressive given the significant disagreement during negotiations on a wide array of issues. One of the most controversial questions was whether the Statute should grant the ICC jurisdiction over the crime of aggression; despite the best efforts of NGOs, ultimately the decision of this issue was postponed to prevent negotiations from stalling. Article Five of the Rome Statute grants the ICC jurisdiction over aggression, but the term "aggression" still awaits a definition via the amendment process and must be accepted by seven-eighths of ICC members no earlier than seven years after the launch of the Statute. With the seven-year anniversary of the establishment of the Rome Statute fast approaching, it will be interesting to

16. Examples of such individuals include Libya's Quaddafi, Panama's Noriega, and Iraq's Hussein.

watch what kind of role the NGOs will play in the negotiations concerning aggression and, consequently, in the potential expansion of the ICC's jurisdiction.

Book Review

Corruption, Inequality, and the Rule of Law, *by* Eric M. Uslaner

Publisher: Cambridge University Press
Price: $95
Reviewed by: Rebecca Krauss and Benjamin Taibleson

INTRODUCTION

> "When I was 13 years old, I delivered a plain white envelope containing a $50 bill to the chief of police of Paterson, New Jersey."

Eric M. Uslaner begins *Corruption, Inequality, and the Rule of Law* by describing his memory of delivering a small bribe on his father's behalf.[1] It is a dramatic opening anecdote, and it suggests the author's fascination with corruption as the product of complicated and diverse human interactions. The senior Uslaner was motivated by a desire to increase business in his stationery store, and he perceived his offering as an act of good faith rather than a contribution to endemic corruption. His son, however, uses the story to introduce an empirical evaluation of corruption writ large in support of a sweeping descriptive theory of its causes. The tension between these two forms of analysis – one anecdotal,[2] and the other empirical – is salient throughout the book. It underlies the failure of some of Uslaner's central claims, but also speaks to the book's latent strengths.

In the chapters that follow, Uslaner proposes a novel and analytically appealing account of the relationship between trust, inequality, and

1. ERIC M. USLANER, CORRUPTION, INEQUALITY, AND THE RULE OF LAW 1 (2008).

2. In this review, we use the term "anecdotal" primarily to refer to Uslaner's narrative accounts of corruption in country-specific case studies (although the opening vignette described here is, admittedly, a more traditional anecdote). As these types of case studies vivify rather than inform a predictive global theory of corruption, we use the word "anecdotal" to emphasize their differences from a data-driven, empirical analysis.

Yale Human Rights and Development Law Journal, Vol. 12 [2009], Iss. 1, Art. 7

corruption, which form what he terms the "Inequality Trap."[3] He describes this theory, and the global empirical analysis that he uses to test it, in the book's first three chapters. The next five chapters examine individual countries – post-Soviet transition countries (Romania in particular), African nations, Hong Kong and Singapore, and the United States. These case studies combine some country-specific empirical analysis with textured descriptions of each country's unique cultural, political, and historical characteristics. Most of these countries do not seem to have succumbed to the Inequality Trap, and Uslaner introduces the case studies in an attempt to reconcile these outliers with his global theory. Finally, Uslaner concludes with ameliorative policy prescriptions, advocating enhanced social welfare programs as a way out of the Inequality Trap.

Uslaner's global empirical model tackles a set of issues (including trust and corruption generally) that defy precise definition and measurement, and his approach and conclusions are accordingly both fascinating and problematic. Although his worldwide measurements of phenomena like "out-group trust" are exciting contributions to development scholarship, he often uses dubious proxy measures and seems, at times, impatient with his own data and analysis. The book's overarching weakness, however, is larger, more serious, and even acknowledged, if half-heartedly, by the author: the global empirical results simply do not support his descriptive theory of corruption.

Instead, in Uslaner's narrative, anecdotal accounts of corruption are often more compelling than his empirical models.[4] Unlike his global Inequality Trap theory, these accounts are distinctively local and can take into consideration a state's history, culture, population composition, and other subtle characteristics. His analysis of New Jersey is a good example: although Uslaner goes to great pains to distinguish between petty and grand corruption in his broad empirical analysis, his opening paragraphs tell a story that links the petty corruption he witnessed as a child to the multimillion-dollar graft of Patterson officials decades later – a single, linear tradition of dishonest New Jersey government, reflected in its unique "anecdotal" history.

Uslaner addresses one of development's most fundamental problems, and while he fails to fully accomplish his goals, his theory and empirical analysis advance the field. The problems Uslaner faces in finding measures for his key variables and aggregating them across nations are endemic to comparative empirical analyses of corruption, and do not

3. USLANER, *supra* note 1, at 24.

4. It is important to note, however, that these anecdotal case studies are most meaningful in the specific context of the country they describe. While Uslaner's description of corruption in Romania provides insight into Romanian corruption, it does considerably less to inform a globally predictive model.

nullify his contribution to the literature. Instead, they suggest a perhaps inevitable recourse to local, "anecdotal" accounts of corruption.[5]

I. EMPIRICAL WEAKNESSES

Uslaner's central thesis is that high inequality leads to low trust in members of different social groups (low "out-group" trust), which in turn causes corruption and ultimately more inequality - creating an Inequality Trap worldwide. Groups that fare economically poorly are skeptical of prosperous groups, and inequality thereby leads to low trust. Coupling low out-group with high in-group trust generates corruption. Groups that feel socially marginalized create patron-client relationships and an "us versus them" atmosphere that feed on corruption and undermine good governance. The corrupt government that results has fewer resources to combat poverty and inequality, and is less capable of governing effectively (closing the Inequality Trap loop). This is a sensible argument, and Uslaner provides a convincing theoretical account for why it might be true. The difficulty, however, is that his data does not support his thesis – unsurprisingly, given the barriers to proving a descriptive thesis explaining such a complex phenomenon.[6]

Uslaner's aggregate analysis is a remarkably ambitious empirical project.[7] Unfortunately, the model's inputs strain its credibility. In order to overcome the impossibility of measuring factors like "trust" directly, for example, Uslaner relies on dubious proxies. "Generalized trust" is imputed to different countries (extrapolating from a World Values Survey covering a smaller set of nations)[8] based on gross national product per capita, import values, legislative effectiveness, type of head of state, tenure of executive, and openness of the economy.[9] Uslaner's finding that generalized trust levels are correlated with corruption is perhaps less powerful than it seems, then, if inputs like "legislative effectiveness" are both related to corruption *and* used to calculate generalized trust. Another

5. *See, e.g.*, Thomas D. Lancaster & Gabriella R. Montinola, *Toward a Methodology for the Comparative Study of Political Corruption*, 27 CRIME L. & SOC. CHANGE 185, 185 (1997) ("[P]roblems of definition, operationalization, and measurement have thus far constrained most students of corruption to ideographic single case studies.").

6. Jong-Sung You and Sanjeev Khagram undertake a similarly ambitious empirical analysis with similarly indeterminate results. *See* Jong-Sung You & Sanjeev Khagram, *A Comparative Study of Inequality and Corruption*, 70 AM. SOC. REV. 136 (2005).

7. He readily admits, "With relatively little movement over time and with a paucity of longitudinal data, statistical analysis is unlikely to be the best tool to uncover whether there is a way out of the inequality trap." USLANER, *supra* note 1, at 242.

8. *See* World Values Survey, http://www.worldvaluessurvey.org/ (last visited Mar. 18, 2009) ("The World Values Survey is a worldwide investigation of sociocultural and political change. . . . Interviews have been carried out with nationally representative samples of the publics of more than 80 societies on all six inhabited continents.").

9. USLANER, *supra* note 1, at 52 n.20.

example: to measure "particularized trust,"[10] Uslaner considers the legal ease of converting to a minority religion.[11] Unlike the proxy for "generalized trust," which considered too many variables, this proxy considers too few. While it seems sensible that respect for minority religions would be related to both out-group trust and the legal ease of converting to those religions, this proxy is not exact enough to justify his empirical conclusions.

Uslaner faces similar problems in his country-specific empirical analyses. Unable to measure corruption in the United States in the 1930s, for example, he approximates it based on the percentage of each state's population that voted for Robert LaFollette, a Progressive party presidential candidate who ran on a platform of clean government.[12] He finds, as a result, that the upper Midwest was the least corrupt area of the United States, and proposes the Scandinavian heritage of its residents as the explanation.[13] Like his trust measurements, this proxy is problematic. Presidential elections and voter behavior are, of course, extremely complicated. Beyond the dubiousness of using state-by-state presidential results as a proxy for state government corruption, it is certainly true that Robert LaFollette received a larger share of the upper-Midwest vote because he was a Wisconsin Senator. LaFollette's anti-corruption themed campaign is, as a result, not a sound foundation for an empirical model.

Compounding the problem with Uslaner's proxies is a broader issue that the author does not deny: the *outcomes* of his empirical models do not convincingly support the Inequality Trap thesis. At the aggregate level, Uslaner admits that "[t]he link from inequality to corruption is weak" — which is to say, he finds no statistically significant direct relationship between the two.[14] Uslaner attempts to overcome this by pointing to links between inequality and trust and between trust and corruption.[15] The result underwhelms in the aggregate analysis and is virtually nonexistent in the case studies, which are devoted primarily to countries whose inequality, trust, and corruption levels do not fit the Inequality Trap thesis at all. Eastern European countries are deeply corrupt, but have low levels of inequality,[16] and Hong Kong and Singapore are the exact opposite.[17] Finally, Botswana and the United States are more moderate outliers, with far less corruption than their levels of inequality would suggest under

10. Particularized trust is trust in members of one's own group.
11. USLANER, *supra* note 1, at 66.
12. *Id.* at 228.
13. Scandinavian countries are famously "clean." See TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX (2008), *available at* http://www.transparency.org/news_room/in_focus/2008/cpi2008/cpi_2008_table.
14. USLANER, *supra* note 1, at 5.
15. "The most important result is that there is an indirect linkage between inequality and corruption and it goes through trust." *Id.* at 71.
16. *Id.* at 94.
17. *Id.* at 181.

Uslaner's model.[18]

The weaknesses of Uslaner's empirical models are not unique; to the contrary, they may be unavoidable in a worldwide statistical analysis of intangibles like "trust" and "corruption," and may speak to the limited utility of these models in development scholarship.[19] Although Uslaner acknowledges many of the problems addressed above, he does not tailor his conclusions to reflect the limitations of his data.[20] Instead, Uslaner makes affirmative empirical assertions on the basis of his models — both at the broadest level (the Inequality Trap thesis) and with regard to specifics (for example, Uslaner claims that "Finland would be as risky for investors as Argentina if it were as corrupt as Bangladesh" or that "[r]aising the trust level of Brazil...to Norway's top rating would raise its quality of government to midway between Spain and Thailand").[21] When the inputs to his models include imputed trust calculations and Robert LaFollette voters, positive statements like these reveal Uslaner's ambition outstripping his data. His affirmative thesis — however theoretically plausible — is simply too vast to rest on such shaky empirics.

II. NARRATIVE CASE STUDIES' QUALIFIED STRENGTHS

Uslaner stands by his thesis and is accordingly forced to fight some of his own data. Failing to find a significant direct link between corruption and inequality, he looks to peoples' *perceptions* of the link to support the Inequality Trap in his case study countries. Uslaner insists that these perceptions are powerful indicators that an Inequality Trap exists, even though his other empirical findings imply that these perceptions are flawed.[22] While it may still be true that perceptions of inequality, without any actual inequality, can lead to corruption, this would be a different thesis.

Uslaner's other primary strategy to address his empirical weaknesses is to take refuge in historical or cultural accounts of corruption in the countries he studies. He explains Romania's combination of low inequality and high corruption by describing its Ottoman heritage, ethnic rivalries,

18. *Id.* at 195, 232.

19. For more on the relative merits of using empirical and case study approaches to corruption, *see* Sten Widmalm, *Explaining Corruption at the Village and Individual Level in India: Findings from a Study of the Panchayati Raj Reforms*, 45 ASIAN SURVEY 756 (2005).

20. For a more limited and credible use of proxy measures in the study of a similar phenomenon, *see, e.g.*, Martin Raiser et al., *Trust in Transition: Cross-Country and Firm Evidence*, 24 J. L. ECON. & ORG. 407 (limiting its conclusions to trust in business settings, not trust generally).

21. USLANER, *supra* note 1, at 73.

22. As an example, the French and the Japanese, who enjoy relatively corruption-free governments, believe that grand corruption is as big a problem in their countries as Kenyans and Bulgarians do in theirs. *Id.* at 90.

and "fatalistic" culture.[23] To understand Estonia's success relative to other transition countries, he considers its energy independence, autonomy under the Soviets, and close ties to Finland.[24] The list goes on: Hong Kong and Singapore are small city-states; Botswana has limited inherent appeal to foreign investors; the Nordic countries have no history of feudalism; Americans are comfortable with economic inequality. This approach reveals the limits of Uslaner's worldwide Inequality Trap thesis. Rather than relying on a systematic, uniform empirical model, Uslaner must resort to these narrative, anecdotal accounts to explain the phenomenon in any given country. The Inequality Trap's failure is instructive, calling into question both its own utility and that of any similarly broad theory of corruption.

Uslaner's fidelity to the Inequality Trap prevents him from considering the historical and cultural characteristics specific to each country as seriously as he otherwise might. In evaluating Hong Kong and Singapore, for example, Uslaner might have had a more compelling explanation for their success were he less focused on the link between economic inequality and corruption, and more on their overall wealth.[25] Instead, Uslaner makes only two brief mentions of the "robust econom[ies]" in these "clean" city-states.[26] The Inequality Trap is blind to this explanatory elephant in the room.

The other serious problem with a reluctant and partially-defended anecdotal account of corruption is its vulnerability to counterexamples.[27] Uslaner's discussion of Botswana highlights this most clearly. Botswana defies Uslaner's theoretical predictions. It has a relatively clean government on a continent that seems otherwise beholden to the Inequality Trap. His explanation for this is based on a feature particular to the country's history and geography: Due to Botswana's landlocked position between historically white racist regimes, it relied heavily on foreign investment. Since "foreign investors would not put their resources into a country where corruption ran rampant," Botswana has a clean government "because it could not afford corruption."[28] In other words, he concludes, "(Economic) necessity may be the mother of (moral) subvention."[29]

Why, if Uslaner is right about Botswana, do we do not see clean governance in such natural resource hinterlands as Kosovo and Haiti?

23. *Id.* at 124.
24. *Id.* at 155-56.
25. Although Uslaner does casually mention that "[i]nequality in a wealthy land may be less consequential for corruption than an inequitable distribution of resources in a poor country," this point is relegated to the sixth bullet in a subsection of his seventh chapter. *Id.* at 212.
26. *Id.* at 205, 207.
27. *See* Lancaster, *supra* note 3, at 203 (recognizing the "idiosyncratic" nature of case studies).
28. USLANER, *supra* note 1, at 195.
29. *Id.*

Given this reality, what is the real explanation for Botswana's clean government? Uslaner has no explanation, because his anecdotal account is only a (perhaps reluctant) supplement to his grander Inequality Trap argument. By picking and choosing between these arguments based on explanatory convenience, Uslaner undermines the force of the Inequality Trap as a globally explanatory tool and becomes vulnerable to objections based on under-supported anecdotal claims. Sustaining both these arguments requires a delicate, and sometimes inconsistent, balancing act.

CONCLUSION

In the final pages of *Corruption, Inequality, and the Rule of Law*, Uslaner candidly acknowledges many of the larger concerns raised here. "Inequality is clearly not the whole story of why corruption is so persistent."[30] Instead, it may be traceable to "'big slow movements' over long periods of time," in which case disentangling the causes and effects of corruption would be "extremely difficult."[31] Although a very detailed anecdotal account (a comprehensive history, really) may be the only way to understand corruption, it would be of limited use to scholars seeking identifiable fixes in the near future. Instead, even an imperfect universal model — for example, the Inequality Trap — may generate relatively useful policy prescriptions.[32]

Uslaner's policy conclusions are, fittingly, inspired by both the Inequality Trap and by anecdotal accounts of corruption. His ultimate recommendation is that "[th]e key mechanism to make people less dependent upon corrupt leaders is a universal social welfare regime - and especially one based on upon education for all."[33] Politicians in countries that enable their citizenry to help themselves through education find little demand for the help-for-hire that they offer, reducing the inequality that breeds corruption. As an example of this, Uslaner credits the establishment of the City University of New York system for cleaning up the famously corrupt Tammany Hall political machine. While this argument characteristically straddles the awkward divide between empirical analysis and anecdotal evidence, Uslaner's predictions and policy prescriptions should enjoy the luxury of a gentler standard. In this case, a reasonable and thoughtful analytical effort may be enough.

Perhaps this compromised approach is necessary when addressing a subject as intractable as worldwide political corruption. Uslaner gets to this compromise the long way — through aggregate empirical models to

30. *Id.* at 242.
31. *Id.* at 244-45.
32. *See* Lancaster, *supra* note 3, at 194 ("Meaningful generalizations about political corruption require going beyond single case studies or theoretical abstractions.").
33. USLANER, *supra* note 1, at 248.

Yale Human Rights and Development Law Journal, Vol. 12 [2009], Iss. 1, Art. 7

particularized historical accounts – and his conclusions feel accordingly anti-climactic. Nonetheless, an anti-climactic nod to moderation may be the only way to reconcile theory-driven scholarship with the messy reality of international development. Uslaner's work accomplishes less than it sets out to, but perhaps no less than could be reasonably expected.